

Title 13 – Real Property and Housing

Chapter 3 – Mortgage and Foreclosure

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Legislative History

Enacted:

Codifying Title 13, Ord. 196 (11/24/03), BIA (11/28/03).

Repealed and Superseded:

Mortgage and Foreclosure Ordinance, Ord. 148 (7/10/01), BIA (7/20/01).

Res. No. 26 (11/19/38) (adopting conditions and processes for repossessing a home purchased by a conditional sales contract).

13-03.010 Title.

This Chapter shall be known and referred to as the “Mortgage and Foreclosure Code.”

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.020 Purpose and Scope.

The purpose of this Chapter is to assist certain Native American borrowers in obtaining mortgage financing for the purchase of homes within the jurisdiction of the Swinomish Tribe by prescribing procedures relating to the recording of mortgages, foreclosure, and eviction in connection with mortgages given to secure loans made by a mortgagee.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.030 Authority.

This Chapter is adopted pursuant to authority provided by the following provisions of the Swinomish Constitution, as most recently amended:

Article VI, Section 1(i), (k), and (l).

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.040 Jurisdiction.

The provisions of the Chapter shall apply to all persons and property subject to the governing authority of the Swinomish Indian Tribal Community as established by the Swinomish Tribal Constitution, By-Laws and Code.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.050 Definitions.

(A) For the purposes of this Chapter, the following words and phrases shall have the following meanings:

- (1) **“Mortgage”** shall mean the first-lien mortgage of a beneficial real property interest given to secure a mortgage loan made by a mortgagee.
- (2) **“Mortgagor”** shall mean any borrower who has executed a mortgage on its beneficial interest in land, including a leasehold interest in land, including any heir(s), successor(s), executor(s), administrator(s) or assign(s) of such borrower.
- (3) **“Mortgagee”** shall mean any mortgage lender or any successors or assigns of such lender, including the Swinomish Housing Authority. This definition also includes any subsequent holder, whether by assignment, succession or otherwise, of the original mortgagee’s right, title or interest in and to the mortgage and/or the mortgaged property, together with any improvements.
- (4) **“Recording Clerk”** shall mean the person designated by the Tribe to perform the functions required by this Chapter or any deputy or designee of such person.
- (5) **“Tribal Court”** means the Court of the Swinomish Indian Tribal Community.
- (6) **“Tribe”** means the Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to section 16 of the Indian Reorganization Act of 1934, whose governing body is the Swinomish Indian Senate.

(B) All other words and phrases shall have their ordinary and customary meanings.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

Subchapter I – Mortgages

13-03.060 Priority.

All mortgages recorded in accordance with the recording procedures set forth in this Chapter, including leasehold mortgages, and loans guaranteed or held by a governmental agency, shall have priority over any lien not perfected at the time of such recording and any subsequent lien or claim except for any statutory lien or claim arising under tribal law, which provides that the lien takes priority over prior liens such as, without limitation, a tax lien or utility easement lien imposed under Title 11 – Utilities.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.070 Recording.

- (A) The Recording Clerk shall maintain a system for the recording of mortgages and such other documents as the Tribe may designate by ordinances or resolutions.

- (B) The Recording Clerk shall endorse upon any mortgage or other document received for recording:
- (1) The date and time of receipt of the mortgage or other document;
 - (2) The filing number, to be assigned by the Recording Clerk, which shall be a unique number for each mortgage or other document received; and
 - (3) The name of the Recording Clerk or designee receiving the mortgage or document.
- (C) Upon completion of the above cited endorsements, the Recording Clerk shall make a true and correct copy of the mortgage or other document and shall certify the copy as follows:
- Swinomish Indian Tribal Community)
)Ss.
Swinomish Indian Reservation)
- I certify that this is a true and correct copy of a document received for recording on this date.
- Given under my hand and seal this _____ day of _____.
(SEAL) _____
(Signature) _____

(Date)
- (D) The Recording Clerk shall maintain the copy in the records of the recording system and shall return the original of the mortgage or other document to the person or entity that presented the same for recording.
- (E) The Recording Clerk shall also maintain a log of each mortgage or other document recorded in which there shall be entered:
- (1) The name(s) of the borrower/mortgagor of each mortgage, identified as such;
 - (2) The name(s) of the lender/mortgagee of each mortgage, identified as such;
 - (3) The name(s) of the grantor(s), grantee(s), or other designation of each party named in any other documents filed or recorded;
 - (4) The date and time of the receipt;

- (5) The filing number assigned by the Recording Clerk; and
- (6) The name of the Recording Clerk or designee receiving the mortgage or document.
- (F) The certified copies of the mortgages and other documents and the log maintained by the Recording Clerk shall be made available for public inspection and copying.
- (G) Rules for copying shall be established and designated by the Recording Clerk.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

Subchapter II – Foreclosure Procedures

13-03.080 Default.

A borrower/mortgagor shall be considered to be in default when thirty (30) days past the due date on a mortgage payment(s) to the lender/mortgagee or when the borrower/mortgagor has been in breach of any other material mortgage provision for at least thirty (30) days.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.090 Face-to-Face Interview.

- (A) Before a borrower/mortgagor becomes ninety (90) days delinquent on mortgage payments and before any foreclosure action or activity is initiated, the lender/mortgagee shall:
 - (1) Make a reasonable effort to arrange a face-to-face interview with the borrower/mortgagor. This shall include at least one trip to meet with the borrower/mortgagor at the mortgaged property.
 - (2) Document that he or she has made at least one phone call to the borrower/mortgagor or the nearest phone as designated by the borrower/mortgagor, able to receive and relay messages to the borrower/mortgagor for the purpose of trying to arrange a face-to-face interview.
- (B) The lender/mortgagee may appoint an agent to perform the services of arranging and conducting the face-to-face interview required by Section 13-03.090(A).

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.100 Information Regarding Loan and Default.

- (A) Before the borrower/mortgagor has been delinquent for ninety (90) days and at least ten (10) days before initiating a foreclosure action in Tribal Court, the lender shall advise the borrower/mortgagor in writing by certified mail or by posting prominently on the mortgaged unit, with a copy provided to the Tribe, as follows:
- (1) That information regarding the loan and default will be given to credit bureaus;
 - (2) That homeownership counseling opportunities and programs may be available through the lender or otherwise; and
 - (3) That other assistance regarding the mortgage/default may be available.
- (B) In addition to the preceding notification requirements, the lender/mortgagee shall complete the following additional notice requirements when a leasehold mortgage is involved:
- (1) Notify the borrower/mortgagor that if the leasehold mortgage remains in default for more than ninety (90) days, the lender/mortgagee may ask the applicable governmental agency to accept assignment of the leasehold mortgage if this is a requirement of the governmental program;
 - (2) Notify the borrower/mortgagor of the qualifications for forbearance relief from the lender/mortgagee, if any, and that forbearance relief may be available from the government if the mortgage is assigned; and
 - (3) Provide the borrower/mortgagor with names and addresses of government officials to whom further communications may be addressed, if any.
- (C) If a borrower/mortgagor has been delinquent for ninety (90) days or more and the lender/mortgagee has complied with the procedures set forth in the first part of this Section, the lender/mortgagee may commence a foreclosure proceeding in Tribal Court by filing a verified complaint as set forth in Section 13-03.110.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.110 Summons and Complaint.

- (A) The verified complaint in a mortgage foreclosure proceeding shall contain the following:
- (1) The name of the borrower/mortgagor and each person or entity claiming through the borrower/mortgagor subsequent to the recording of the mortgage, including each subordinate lienholder, except the Tribe with respect to a claim for a tribal leasehold, as a defendant;

- (2) A description of the property subject to the mortgage;
 - (3) A concise statement of the facts concerning the execution of the mortgage or in the case of a leasehold mortgage the lease; the facts concerning the recording of the mortgage or the leasehold mortgage; the facts concerning the alleged default(s) of the borrower/mortgagor; and such other facts as may be necessary to constitute a cause of action;
 - (4) True and correct copies of each promissory note, mortgage (if a leasehold mortgage, a copy of the lease), or assignment thereof; and
 - (5) Any applicable allegations concerning relevant requirements and conditions prescribed in: (a) federal statutes and regulations; (b) the tribal Code and regulations; and/or (c) provisions of the lease or leasehold mortgage, or security instrument.
- (B) The complaint shall be provided to the clerk of the Tribal Court along with a summons specifying a date and time of appearance for the Defendant(s).

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.120 Service of Process.

- (A) Service of process shall be performed according to the procedures set forth in Chapter 13-03 – Rules of Civil Procedure.
- (B) Parties to the matter shall include the creditor, debtor, and all subordinate lienholders. For a leasehold agreement, additional parties shall include the Tribe and the United States.
- (C) Defendants shall have twenty (20) days to file an answer, counterclaims, and/or affirmative defenses, or as otherwise provided by Chapter 3-02 – Rules of Civil Procedure.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.130 Procedure.

- (A) Evidence shall be admitted according to Chapter 3-02 – Rules of Civil Procedure.
- (B) The Burden of Proof shall be in accordance with Chapter 3-02 – Rules of Civil Procedure.

- (C) To the extent that a procedural question is not answered by this Mortgage and Foreclosure Chapter, the relevant portions of Chapter 3-02 – Rules of Civil Procedure shall be applied.
- (D) In the event of a conflict between a particular provision of this Chapter and Chapter 3-02 – Rules of Civil Procedure or Chapter 13-02 – Evictions, the provisions of this Chapter shall apply.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.140 Cure of Default by Subordinate Lienholder.

- (A) Prior to the entry of a judgment of foreclosure of a mortgage pursuant to this Chapter, any borrower/mortgagor or a subordinate lienholder may cure the default(s) under the mortgage by making a full payment of the delinquency to the lender/mortgagee and all reasonable legal and Tribal Court costs incurred in foreclosing on the property.
- (B) Any subordinate lienholder who has cured a default shall thereafter have included in its lien the amount of all payments made by such subordinate lienholder to cure the default(s), plus interest on such amounts at the rate stated in the note for the mortgage.
- (C) There shall be no right of redemption in any leasehold mortgage foreclosure proceeding.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.150 Trial Date.

A foreclosure action shall be heard and decided by the Tribal Court in a prompt and reasonable time period not to exceed sixty (60) days from the date of service of the complaint on the borrower/mortgagor, or as otherwise provided by Chapter 3-02 – Rules of Civil Procedure.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.160 Judgment.

If the alleged default has not been cured at the time of trial and the Tribal Court finds for the lender/mortgagee, the Tribal Court shall enter a judgment foreclosing the interest of the borrower/mortgagor and each other defendant, including the subordinate lienholder(s), if any, in the mortgage, transferring the mortgage to the lender/mortgagee or the lender's designated assignee and ordering the sale of the foreclosed property.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.170 Sale.

The sale of the foreclosed property referred to in Section 13-03.160 shall be executed by a duly authorized law enforcement officer or officer of the Court, appointed by the Court for such a purpose in the manner specified in this Chapter.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.180 Leasehold Mortgage.

In the case of a leasehold mortgage, the lease will be assigned to the lender/mortgagee or the lender's designated assignee, subject to the following provisions:

- (A) The lender shall give the Tribe the right of first refusal on any acceptable offer to purchase the lease or leasehold mortgage at issue.
- (B) The lender or lender's designated assignee may only transfer, sell or assign the lease and/or leasehold mortgage to a tribal member, the Tribe, or the Housing Authority.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.190 Foreclosure Evictions.

Foreclosure evictions shall be handled according to the general eviction process set forth in Chapter 13-02 – Evictions, with the added provision that foreclosure eviction proceedings shall not occur until after the borrower/mortgagor, lessee, occupier has received thirty (30) calendar day's notice, and remains in possession of the property contrary to the terms of the notice. All foreclosure evictions shall occur no later than sixty (60) days from the date of service of the notice of foreclosure.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.200 No Merger of Estates.

There shall be no merger of estates by reason of the execution of a lease or a leasehold mortgage or the assignment or assumption of the same, including an assignment adjudged by the Tribal Court, or by operation of law, except as such merger may arise upon satisfaction of the leasehold mortgage.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.210 Certified Mailing to Tribe and Lessor.

For any foreclosure proceedings on a lease or leasehold mortgage where the Tribe or the lessor(s) is not named as a defendant, a copy of the summons and complaint shall be mailed to the Tribe and to the lessor(s) by certified mail, return receipt requested, within five (5) days after the issuance of the summons. If the location of the lessor(s) cannot be ascertained after reasonable inquiry, a copy of the summons and complaint shall be mailed to the lessor(s) in care of the superintendent of the applicable agency of the Bureau of Indian Affairs.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.220 Intervention.

The Tribe or any lessor may petition the Tribal Court to intervene in any lease or leasehold mortgage foreclosure proceeding under this Chapter.

[History] Ord. 196 (11/24/03).

13-03.230 Sovereign Immunity.

Neither the filing of a petition for intervention by the Tribe, nor the granting of such a petition by the Tribal Court, shall operate as a waiver of the sovereign immunity of the Tribe, except as may be expressly authorized by the Tribe.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.240 Appeals.

Appeals under this Chapter shall be handled in accordance with Chapter 3-04 – Rules of Appellate Procedure.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

Subchapter III – Conditional Sales Contracts

13-03.250 Conditional Sales Contracts.

Property purchased by members of the Tribe under conditional sales contracts, which provide that the ownership of the property is in the seller until paid for, may be repossessed on the Reservation by the owner in the event the buyer fails to perform under the terms of the contract, under the same conditions and by the same processes that are used with other citizens of the State.

[History] Ord. 196 (11/24/03); Res. 26 (11/19/38).

Subchapter IV – Repealer, Severability and Effective Date

13-03.260 Repealer.

This Chapter hereby repeals Ordinance 148 and Resolution 26.

[History] Ord. 196 (11/24/03).

13-03.270 Severability.

The invalidity of any section, clause, sentence or provision of this Chapter shall not affect the validity of any part of this Chapter that can be given effect without such invalid part or parts.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).

13-03.280 Effective Date.

This Chapter shall become effective immediately upon approval by the Secretary of the Interior or the Secretary's designated representative.

[History] Ord. 196 (11/24/03); Ord. 148 (7/10/01).